IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2004 Session

THOMAS SALLEE v. TYLER BARRETT

A Direct Appeal from the Circuit Court for Montgomery County
No. 50300248 The Honorable Ross H. Hicks, Judge

No. M2003-01893-COA-R3-CV - Filed September 24, 2004

Plaintiff/Appellant sued Defendant/Appellee, a police officer with the City of Clarksville, for negligent infliction of emotional distress, stemming from Defendant/Appellee's negligent discharge of his firearm. Pursuant to the provisions of T.C.A. §29-20-205(2), the trial court granted the Defendant/Appellee's Tenn. R. Civ. P. 12 Motion to Dismiss. Plaintiff/Appellant appeals. We reverse and remand.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Phillip L. Davidson of Nashville for Appellant, Thomas Sallee

David Haines of Clarksville for Appellee, Tyler Barrett

OPINION

On April 3, 2002, Thomas Sallee ("Sallee," "Plaintiff," or "Appellant") was standing at the counter of the Amoco station located at 601 Riverside Drive in Clarksville, Tennessee. Tyler Barrett ("Barrett," "Defendant," or "Appellee"), a police officer employed by the City of Clarksville, was also inside the Amoco, standing several feet behind Sallee. As Sallee was talking to the station's clerk, Barrett placed his hand on his weapon, which was still located in its holster. The weapon discharged and the bullet struck the floor near Barrett's right foot.

On March 25, 2003, Sallee filed suit against Barrett. The Complaint reads as follows:

COMPLAINT

Comes the plaintiff complaining of the defendant and would show unto the Court.

1. Parties.

1.1. Plaintiff. The plaintiff, Thomas Sallee [Sallee] is a resident of Montgomery County, Tennessee. At all times mentioned in this complaint Sallee was acting in a non-negligent manner.

1.2. Defendant. The defendant, Tyler Barrett [Barrett] at all times mentioned in this complaint was a police officer employed by the City of Clarksville, Tennessee and was acting within the scope of his employment.

2. Facts. On April 3, 2002, Sallee was inside the Amoco station at 601 Riverside Drive in Clarksville. Sallee was located at the counter. Barrett was several feet behind Sallee.

2.1. As Sallee was talking to the station's clerk who was behind the counter, Barrett['s] hand went to his weapon's holster. Barrett's weapon immediately discharged its bullet striking the floor near Barrett's right foot.

2.2. The gun's discharge was loud, startling and unexpected.

3. Negligence. Barrett was negligent in that he failed to maintain his weapon in its holster in a safe, secure manner as to not have it discharge in public.

3.1. Barrett's actions constituted negligent infliction of emotional distress.

4. Injuries. As a direct and proximate cause of the negligence of Barrett heretofore described, Sallee suffered severe and permanent emotional distress and now has post traumatic stress disorder.

WHEREFORE, the plaintiff prays:

1. That he be awarded compensatory damages in the statutory amount for shock, fright, great emotional distress and medical expenses.

2. That he be granted the cost of this case.

> 3. That he be granted such other and further relief as the Court may deem proper.

On April 8, 2003, Barrett filed a Motion to Dismiss for failure to state a claim on which relief can be granted. The Motion to Dismiss was supported by a Memorandum of Law, which specifically alleges that Barrett is immune from liability in this matter, pursuant to T.C.A. 29-30-310(b). On May 29, 2003, Sallee filed "Plaintiff's Response to the Defendant's Motion to Dismiss or in the Alternative Motion to Amend," which reads, in pertinent part, as follows:

> 1. That suit is proper against the defendant, Tyler Barrett because T.C.A. § 29-20-205(2) specifically states that a City may be sued for negligent acts of its employees which are based upon infliction of mental anguish, and;
>
> 2. T.C.A. § 29-20-310(b) summarizes employees of the governmental entity can be sued; and
>
> 3. Negligent infliction of emotional distress is not an intentional tort. It is an act of negligence.
>
> In the alternative, if the Court finds that Barrett is criminal, the plaintiff's request [sic] to be allowed to amend his complaint to bring the City of Clarksville as a defendant.

On June 3, 2003, Barrett filed a "Reply to Plaintiff's Response to Defendant's Motion to Dismiss," which asserts that "an amendment adding the City of Clarksville as a Defendant will not relate back to the date of filing of the original Complaint, and such an action will be barred by the applicable statute of limitations." The Motion to Dismiss was heard by the trial court on June 5, 2003 and an "Order of Dismissal" (the "Order") was entered on June 30, 2003. The Order reads, in relevant part, as follows:

> ...the Court is of the opinion that Plaintiff's Complaint against Defendant Tyler Barrett fails to state a claim upon which relief can be granted, pursuant to the provisions of T.C.A. §29-20-205. Additionally, Plaintiff's request to amend his Complaint to substitute the City of Clarksville as a party defendant would be futile, as such a[n] amendment would not relate back to the original date of the filing of Plaintiff's Complaint.
>
> Plaintiff's claim against Defendant Tyler Barrett is hereby dismissed with prejudice. Additionally, Plaintiff's Motion to Amend his Complaint in this matter is denied.

On July 3, 2003, Sallee filed a Tenn. R. Civ. P. 59.04 Motion to Alter Judgment. Barrett filed a Response to this Motion on September 3, 2003. The trial court heard arguments on the Motion to Alter Judgment on September 12, 2003 and denied the Motion by "Memorandum Opinion," entered on September 29, 2003.

Sallee appeals and raises two issues for review as stated in his brief:

> I. Does Tenn. Code Ann. § 29-20-205(2) include both negligent and intentional infliction of emotional distress so as to grant immunity to the City of Clarksville from suit?
>
> II. Should the trial court, under the circumstances of this case, have granted the Plaintiff leave to amend its Complaint to add the City of Clarksville as Defendant in this suit?

It is well settled that a motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. It admits the truth of all relevant and material allegations but asserts that such allegations do not constitute a cause of action as a matter of law. ***See Riggs v. Burson***, 941 S.W.2d 44 (Tenn.1997). Obviously, when considering a motion to dismiss for failure to state a claim upon which relief can be granted, we are limited to the examination of the complaint alone. ***See Wolcotts Fin. Serv., Inc. v. McReynolds***, 807 S.W.2d 708 (Tenn.Ct.App.1990). The basis for the motion is that the allegations in the complaint considered alone and taken as true are insufficient to state a claim as a matter of law. ***See Cornpropst v. Sloan***, 528 S.W.2d 188 (Tenn.1975). In considering such a motion, the court should construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. ***See Cook Utihoven v. Spinnaker's of Rivergate, Inc.***, 878 S.W.2d 934 (Tenn.1994).

Employees of governmental entities are immune from liability for which the immunity of the governmental entity is removed except in the case of medical malpractice, to wit:

> No claim may be brought against an employee or judgment entered against an employee for damages for which the immunity of the governmental entity is removed by this chapter unless the claim is one for medical malpractice brought against a health care practitioner....

T.C.A. §29-20-310(b) (2000).

In other words, if the governmental entity, in this case the City of Clarksville, is amenable to suit (i.e. its immunity has been removed by T.C.A. §29-20-205), then Barrett is immune from suit under §29-20-310(b). On the other hand, if the City of Clarksville, is immune from suit (i.e. its immunity has not been removed by T.C.A. §29-20-205), then Barrett is a proper party to this action.

Immunity of governmental entities for injuries resulting from the negligent acts or omissions of employees while in the scope of employment has been removed, with certain exceptions, by T.C.A. §29-20-205, to wit:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:
>
> * * *
>
> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, ***infliction of mental anguish***, invasion of right of privacy, or civil rights.

T.C.A. §29-20-205 (2000) (emphasis added).

Sallee's cause of action is negligent infliction of emotional distress asserted only against the City of Clarksville's employee, Barrett. Barrett asserts that the trial court was correct in dismissing the case because, under T.C.A. §29-20-205(2) and our Supreme Court's ruling in ***Limbaugh v. Coffee Medical Center et al.***, 59 S.W.3d 73 (Tenn. 2001), the City of Clarksville's immunity is removed and, consequently, Barrett is not a proper party to this suit under T.C.A. §29-20-310(b). Although the ***Limbaugh*** Court refers to T.C.A. §29-20-205(2) as the "intentional tort exception," we cannot go so far as the Appellee to say that ***Limbaugh*** stands for the proposition that "infliction of mental anguish" must have arisen from an intentional act of its employee in order to make the City of Clarksville immune to suit in this case. Rather, the ***Limbaugh*** Court merely declined to expand the statutory list of torts in T.C.A. §29-20-205(2) to include the intentional torts of assault and battery, to wit:

> Accordingly, we hold that section 29-20-205 of the GTLA removes immunity for injuries proximately caused by the negligent act or omission of a governmental employee except when the injury arises out of *only those specified torts enumerated in subsection (2).* To immunize *all* intentional torts would result in an overly broad interpretation of the statute, and there is no indication that the legislature intended such a result. Indeed, we find it noteworthy that the legislature excluded the two intentional torts most likely to give rise to injury. Under the maxim "*expressio unius est exclusio alterius*," which states the principle that the expression of one thing implies the exclusion of all things not expressly mentioned, ***City of Knoxville v. Brown***, 195 Tenn. 501, 260 S.W.2d 264, 268 (1953), we are unable to expand the intentional torts exception to include assault and battery. To do so would be to judicially create two additional

> exceptions giving rise to an entity's immunity. To the extent that Potter and other cases hold otherwise, they are overruled.

Id. at 84 (footnotes omitted).

In ***Elmore v. Cruz***, No. E2001-03136-COA-R3-CV, 2003 WL 239169, at *5 (Tenn. Ct. App. Feb. 4, 2003), the Eastern Section of this Court found that the Court in ***Limbaugh*** "recognized that this section [T.C.A. 29-20-205(2)] applies to intentional torts"and referred to this section as the "intentional tort exception." We cannot agree with the ***Elmore*** Court that ***Limbaugh*** requires that the section is applicable only to intentional acts by the employees of governmental entities.

The basis of the ***Limbaugh*** decision rests on the law of statutory construction:

> It is well-settled that the role of this Court in construing statutes is "to ascertain and give effect to" the legislative purpose and intent without unduly restricting or expanding a statute's coverage beyond its intended scope. ***Mooney v. Sneed***, 30 S.W.3d 304, 306 (Tenn.2000). " 'The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language, without a forced or subtle interpretation that would limit or extend the statute's application.' " ***Id***. (quoting ***State v. Blackstock***, 19 S.W.3d 200, 210 (Tenn.2000)). Courts are not authorized to alter or amend a statute, and must " 'presume that the legislature says in a statute what it means and means in a statute what it says there.' " ***Id***. at 307 (quoting ***BellSouth Telecomm., Inc. v. Greer***, 972 S.W.2d 663, 673 (Tenn.Ct.App.1997)); ***Gleaves v. Checker Cab Transit Corp***., 15 S.W.3d 799, 803 (Tenn.2000) (" 'If the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction.' " (quoting ***Henry v. White***, 194 Tenn. 192, 250 S.W.2d 70, 72 (1952))). This last principle applies especially when analyzing the GTLA, as the legislature created this Act in derogation of the common law, and therefore, the Act must be strictly construed. ***Roberts***, 963 S.W.2d at 746 (citing ***Lockhart ex rel. Lockhart v. Jackson-Madison County Gen. Hosp***., 793 S.W.2d 943 (Tenn.Ct.App.1990)).
>
> Applying the foregoing principles of statutory construction, we conclude that it was error to expand the intentional torts exception to include the torts of assault and battery. The legislative intent has been expressed in plain and unambiguous terms, and we are therefore required to enforce the statute as written. The General Assembly expressly created section 29-20-205 to remove governmental

> immunity for injuries proximately caused by negligent acts; that it wanted to then create several exceptions to this general waiver convinces us that additional exceptions are not to be implied absent legislative intent to the contrary. ***Cf. United States v. Smith***, 499 U.S. 160, 167, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

Limbaugh, 59 S.W.2d at 83.

Sallee relies upon this Court's opinion in ***Lockhart v. Jackson-Madison County General Hospital***, 793 S.W.2d 943 (Tenn. Ct. App. 1990) for the proposition that negligent infliction of emotional distress is a tort for which a governmental entity is immune. Barrett argues that the Supreme Court's holding in ***Limbaugh***, and this Court's opinion in ***Elmore***, implicitly overrule this Court's opinion in ***Lockhart***. We disagree. In ***Lockhart***, this Court applied the rules of statutory construction and held as follows:

> In the instant case the applicable language of T.C.A. § 29-20-205 is as follows:
>
> > Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:
> >
> > * * * * * *
> >
> > (2) Arises out of ... infliction of mental anguish....
>
> In cases not involving the doctrine of governmental immunity, our courts have, with certain exceptions, generally denied recovery where the defendant's negligence causes mental disturbance with no physical injury or physical consequence. ***Laxton v. Orkin Exterminating Co., Inc***., 639 S.W.2d 431 (Tenn.1982). The Court in ***Laxton*** carved out yet another exception to the general rule after discussing the various exceptions that had previously been allowed by our courts. 639 S.W.2d at 433-34.
>
> Most of the cases cited in ***Laxton*** pre-date the passage of the act in question, and we find it significant that the legislature, knowing that various exceptions had been made to the general rule, specifically made provisions in the act that governmental immunity would not be removed for any injury arising out of "infliction of mental anguish."

> The language of the statute is clear and unambiguous that the legislature did not remove governmental immunity for any injury which arises out of mental anguish. We believe the plain language of the statute justifies no other construction of the legislature's intent.

The legislature's intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language, without forced or subtle interpretation that would limit or extend the statute's application. ***State v. Blackstock***, 19 S.W.2d 200, 210 (Tenn. 2000). In T.C.A. §29-20-205(2), it appears that the legislature intended both intentional infliction of emotional distress and negligent infliction of emotional distress to trigger a governmental entity's immunity. As this Court points out in ***Lockhart***, *supra*, had the legislature not so intended, it would have made a distinction between negligent and intentional infliction of emotional distress. Significantly, the ***Lockhart*** case, which granted immunity to the governmental entity for negligent infliction of emotional distress, was cited in ***Limbaugh*** for the proposition that the Governmental Tort Liability Act must be strictly construed. 59 S.W.2d at 83.

Based upon the plain and unambiguous language of T.C.A. §29-20-205(2), we find that the legislature intended to include both negligent and intentional infliction of emotional distress in this exception to the removal of a governmental entity's immunity. Since the City of Clarksville is immune from suit for the negligent infliction of emotional distress arising from its employee's negligent act, under T.C.A. §29-20-310(b), Barrett is the proper Defendant in this suit.

Having determined that the trial court erred in granting Barrett's Motion to Dismiss upon its finding that the City of Clarksville, as opposed to Barrett, was the proper party to this suit, we pretermit discussion of Appellant's second issue. However, our analysis does not stop here. We now turn to a discussion of whether Sallee's Complaint states a claim for relief for negligent infliction of emotional distress.

In order to make out a prima facie case of negligent infliction of emotional distress, the plaintiff must prove the elements of duty, breach of duty, injury or loss, causation in fact, and proximate cause. ***See Camper v. Minor***, 915 S.W.2d 437, 446 (Tenn.1996). In ***Camper***, the Court further held that recovery for negligent infliction of emotional distress claims, where there is no physical injury, is limited to serious or severe emotional injury supported by expert medical or scientific proof. ***Id.*** A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." ***Id*** (citations omitted). As discussed by our Supreme Court in ***Estate of Amos v. Vanderbilt Univ. et al.***, 62 S.W.3d 133 (Tenn. 2001), the heightened proof and pleading requirements of ***Camper*** are mandatory for stand-alone claims of negligent infliction of emotional distress, to wit:

> The special proof requirements in Camper are a unique safeguard to ensure the reliability of "stand-alone" negligent infliction of emotional distress claims. ***Camper***, 915 S.W.2d at 440; ***see also***

> ***Miller v. Willbanks***, 8 S.W.3d 607, 614 (Tenn.1999). The subjective nature of "stand-alone" emotional injuries creates a risk for fraudulent claims. ***Miller***, 8 S.W.3d at 614 ("legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury"); ***see Camper***, 915 S.W.2d at 440. The risk of a fraudulent claim is less, however, in a case in which a claim for emotional injury damages is one of multiple claims for damages. When emotional damages are a "parasitic" consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to "stand-alone" emotional distress claims. ***See Kush v. Lloyd***, 616 So.2d 415, 422-23 (Fla.1992); ***see also Naccash v. Burger***, 223 Va. 406, 290 S.E.2d 825, 831 (1982); ***Phillips v. United States***, 575 F.Supp. 1309, 1318-19 (D.S.C.1983).

Id. at 136-37.

Under ***Estate of Amos***, Sallee's stand-alone claim for negligent infliction of emotional distress is subject to the heightened requirements of ***Camper***. A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. ***Davis v. The Tennessean***, 83 S.W.3d 125, 127 (Tenn. Ct. App.2001); ***Pendleton v. Mills***, 73 S.W.3d 115, 120 (Tenn. Ct. App.2001). Accordingly, courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, ***Stein v. Davidson Hotel***, 945 S.W.2d 714, 716 (Tenn.1997), and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 5-6(g), at 254 (1999). On appeal from an order granting a Tenn. R. Civ. P. 12.02(6) motion, this Court must likewise presume that the factual allegations in the complaint are true, and we must review the trial court's legal conclusions regarding the adequacy of the complaint without a presumption of correctness. ***Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.***, 986 S.W.2d 550, 554 (Tenn.1999); ***Stein v. Davidson Hotel***, 945 S.W.2d at 716.

Sallee's Complaint, as set out *supra*, alleges that, as a result of Barrett's negligence, Sallee "suffered severe and permanent emotional distress and now has post traumatic stress disorder." Furthermore, Sallee prays for compensatory damages to include "medical expenses." Taking all of the factual allegations of the Complaint as true, ***Stein v. Davidson Hotel***, 945 S.W.2d at 716, and by giving the Sallee the benefit of all the inferences that can be reasonably drawn from the pleaded facts, we find that the Complaint is sufficient to survive Defendant's Motion to Dismiss.

For the foregoing reasons, we reverse the Order of the trial court, granting Appellee's Motion to Dismiss, we remand the case for such further proceedings as may be necessary. Costs of this appeal are assessed to the Appellee, Tyler Barrett.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.